TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

PETITION FOR CERTIORARI FILED JUNE 28, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,157)

( )

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1930

[fol. 1] [Caption omitted]

[fol. 2] IN SUPERIOR COURT OF NEW HAVEN COUNTY

E. F. FLYNN, Ex'r,

vs.

N. Y., N. H. & H. R. R. Co.

SUMMONS

To the sheriff of the county of New Haven, his deputy, or either constable of the town of New Haven, within said county, Greeting:

By authority of the State of Connecticut, you are hereby commanded to summon The New York, New Haven and Hartford Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, to appear before the Superior Court to be held at New Haven, in and for the county of New Haven, on the first Tuesday of June, 1929, then and there to answer unto Edward F. Flynn, of the town of West Haven, county of New Haven, State of Connecticut, as he is the executor of the estate of Edward L. Flynn, deceased, late of said town of West Haven, in a civil action wherein the plaintiff complains and says:

COMPLAINT

1. That on the fourth day of December, 1923, and for a number of years prior thereto, the defendant was a common carrier by railroad and as such common carrier was, on December 4, 1923, engaged in the business of transportation between the different States of the United States.

2. That on the fourth day of December, 1923, and for a number of years prior thereto, the defendant maintained at its Cedar Hill Yards located in the town and county of New Haven, State of Connecticut, a certain turn table, said turn table being used by the said defendant for the pur-

pose of switching locomotives engaged in interstate commerce, and while the plaintiff's testator, Edward L. Flynn, on said date was working upon the aforesaid turn table and was in the employ of the defendant, and while he and the defendant were then and there engaged in interstate commerce between the different States of the United States, he was caused to fall and sustained a reopening of an old fracture of the spine, and internal injuries to the stomach and abdomen which caused his death.

3. That said injuries and death were caused without any negligence on his part but solely by the negligence and [fol. 3] wrongful acts and omissions of the defendant's officers, agents and employees, and that the defendant failed to furnish proper safety appliances, and directed the plaintiff's testator to work upon said turn table while locomotives engaged in interstate commerce were run on and off said turn table, and that the defendant conducted its work by unsafe and dangerous methods, and failed to formulate and enforce proper rules and regulations for the safe conduct of the work, and while the plaintiff's testator was at work repairing and supervising the repairing of said turn table, and he, the said plaintiff's testator, being in the exercise of due care, a locomotive controlled and operated by the defendant was run upon said turn table in a negligent and careless manner; in that the officer, agent or employee of the defendant operating said locomotive struck said turn table with unusual force, and without sounding any warning of the approach of said locomotive, and further, that said officer, agent or employee of the defendant, ran said locomotive on to the said turn table when said turn table was not in the proper position to receive locomotives, and as a result, the plaintiff's testator was thrown with considerable force to the floor of said turn table, and sustained a reopening of an old fracture of the spine, and internal injuries to the stomach and abdomen which caused his death on September 1, 1928.

4. That said deceased left him surviving as his heirs and next of kin, his widow, Mary Flynn, five daughters, namely, Mary E. Flynn, aged twenty-six years; Nora T. Flynn, aged twenty-four; Catherine Flynn, aged twenty-one; Helen Flynn, aged nineteen and Gertrude Flynn, aged

eleven; and three sons, namely, the plaintiff, Edward F. Flynn, aged twenty-two; Joseph Flynn, aged sixteen, and Lawrence Flynn, aged thirteen, all of whom, at the time of the death of the deceased, in the manner aforesaid, and for a long time prior thereto, were dependent upon said deceased, and to whose support he contributed $160 per month. The said heirs and next of kin, dependents of the deceased, have, by reason of the deceased's death in the manner aforesaid, suffered a pecuniary loss.

[fol. 4] 5. That the plaintiff's testator left a last will and testament, and therein named the plaintiff executor of his estate, and that heretofore and before the date of this writ, the plaintiff was appointed executor of the estate of the said Edward L. Flynn by the Probate Court for the district of New Haven, said court having jurisdiction over the estate of the said Edward L. Flynn, and the said plaintiff has duly qualified and is now acting as such.

The plaintiff claims $30,000 damages.

Thomas R. FitzSimmons of New Haven is recognized in the sum of $70 to prosecute.

Of this writ with your doings thereon make due service and return.

Dated at New Haven this fifteenth day of May, A. D. 1929.

William F. Geenty, Commissioner of the Superior Court for New Haven County.

[Consent is hereby given to the filing of the within pleading and service of writ accepted. E. R. Brumley, attorney for New York, New Haven and Hartford Railroad Company.]

IN SUPERIOR COURT OF NEW HAVEN COUNTY

[Title omitted]

DEMURRER TO COMPLAINT—Filed June 10, 1929

Defendant demurs to plaintiff's complaint because it does not state facts sufficient to constitute a cause of action in that (1) as said complaint alleges that the injury

to the deceased occurred on the fourth day of December, 1923, and that his death occurred from said injuries on the first day of September, 1928, plaintiff's action is barred by the Act of April 22, 1908, chapter 149, section 6, and [fol. 5] other sections, as amended by the Act of April 5, 1910, chapter 143, section 1, and other sections, commonly known as the Federal Employers' Liability Act, which provides that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued;" (2) in that, in view of the aforesaid facts alleged in plaintiff's complaint, under said Act no cause of action for the death of the decedent could ever accrue to the plaintiff; (3) in that, in view of the aforesaid facts alleged in plaintiff's complaint, under said Act no right of action in the deceased survived to the plaintiff; (4) in that, in view of the aforesaid facts alleged in plaintiff's complaint, under said Act no right of action of deceased was revived in the plaintiff; (5) in that said complaint fails to allege that deceased underwent conscious suffering, such an averment being necessary under the Federal Employers' Liability Act.

The New York, New Haven and Hartford Railroad Company, Defendant, by E. R. Brumley, Its Attorney.

[Sustained July 11, 1929, by Ells, Judge. Memo. filed.]

In Superior Court of New Haven County

[Title omitted]

Memorandum of Decision on Demurrer—Filed July 11, 1929

Edward Flynn was injured December 4, 1923. It was his right to sue the railroad at any time within two years. He did not do so, and consequently at the time he died in 1928 he had no right of action. If he had died within the two years, then very clearly his family could sue at any time within two years from the date of his death. The [fol. 6] defendnant claims that the right of the family to

sue is dependent on the existence of a right of action in the injured person at the time of his death.

In the very recent case of Mellon v. Goodyear, 277 U. S. 335, it was held that if the injured person had settled or compromised his claim for his personal loss and suffering, obviously nothing passed to his administratrix because of such loss and suffering, and that when he had given a general and complete release even the right of action given to his family for pecuniary loss sustained by them through his death was lost.

The reasoning is that the foundation of the right of action is the original wrongful injury to the decedent, and that the new action (in behalf of the family) "is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." And again, "by the overwhelming weight of judicial authority where a statute of the nature of Lord Campbell's act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury." The court cites with approval a statement from Tiffany, "if the deceased in his lifetime has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representative for his death."

Taking these statements at their face value the conclusion necessarily follows, that if the injured person allowed his right to lapse, and if at the time he died he had no cause of action, then this second action by his dependents is also barred. The plaintiff claims, however, that because the Mellon case on its facts holds that a release based on satisfaction for the injury is a bar, it does not necessarily follow that the mere neglect of the injured man to bring suit resulting in the extinguishment of his right of action would likewise be a bar to an action by his dependents. Certainly the reasoning of the court goes the whole distance. It runs with the plaintiff's contention in so far as it reasons that the act declares two distinct and independent liabilities resting upon the common foundation [fol. 7] of a wrongful injury, but based upon altogether different principles; but diverges from the plaintiff's views

when it goes on to say "but as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

This is not an unjust result. The foundation of both causes of action is the wrongful injury. The injured person is given two years in which to assert his claim. If the injury is fatal his family can bring an action at any time within two years from the date of death for the wrong done to them by the injury resulting in death. It is fair that their claim, although different in nature and principle should be dependent on the existence of a right in the injured person at the time he died. If the injured person lived six months and then died both actions could prevail because it is a "single recovery for a double wrong." All this is fair and just, even liberal. But to go on and say that a man could be injured and make no claim and when he died forty years later allow his family to assert that his death resulted from the injury and that they should be compensated would do violence to the purposes of the statute of limitation.

To conclude. Edward Flynn was injured. Immediately there arose his right to sue within two years for the injury done to him. If he died as a result of the injury a new action came into existence; one for his family for the wrong done to them for causing his death. But the second action is founded on the original injury. If Edward Flynn had been compensated for his injury; if he had lost his right of action: if his cause of action for that injury no longer existed; their cause of action never came into existence. It arises only when there is a cause of action for the injury still in existence. With all liability to Mr. Flynn for his injury gone, however, it may have been extinguished, a liability does not arise as to his family.

The oral arguments and briefs proceed on the agreed statement of facts that no suit on behalf of Mr. Flynn had [fol. 8] been brought in his lifetime. This does not appear on the face of the pleadings. I have considered the de-

murrer as though this fact did appear, in order that the real question might be fully decided.

The demurrer is sustained.

Ells, Judge.

In Superior Court of New Haven County

Edward F. Flynn, of New Haven, Executor of the Estate of Edward L. Flynn,

vs.

The New York, New Haven and Hartford Railroad Company, a Connecticut Corporation Located in New Haven

Judgment—September 27, 1929

This action, by complaint claiming $30,000 damages came to this court on the first Tuesday of June, 1929, and thence to the present time when the parties appeared and were at issue on demurrer to the complaint as on file.

The court having heard the parties finds the issues for the defendant and that said complaint is insufficient.

The plaintiff having neglected and refused to plead further, it is thereupon adjudged that the defendant recover of the plaintiff its costs, taxed at — dollars and — cents.

By the court.

Alfred N. Wheeler, Clerk.

[fol. 9] In Superior Court of New Haven County

[Title omitted]

Petition for Appeal and Order Allowing Same—Filed Oct. 3, 1929

In the above entitled cause the plaintiff (appellant) appeals from the judgment of said court to the Supreme Court of Errors, for a revision of the errors which he claims to have occurred in the trial thereof, and for reasons of said appeal assigns the following:

1. The court erred in rendering the judgment on file.

2. The court erred in sustaining the demurrer.

3. The court erred in sustaining the demurrer, in holding that the statute of limitations had run against the plaintiff's cause of action.

4. The court erred, in sustaining the demurrer, in holding that in order for the plaintiff to have a cause of action, it would be necessary for Edward L. Flynn, the deceased, to have died within two years from the date he was injured.

5. The court erred, in sustaining the demurrer, in holding that due to the failure of the deceased, in not having brought an action wthin two years from the date he was injured, the plaintiff was to be charged with his (deceased's) laches and laxity.

6. The court erred, in sustaining the demurrer, in holding that the neglect of the injured man to bring suit, resulted in the extinguishment of his right of action, and a bar to this action by his dependents.

7. The court erred, in sustaining the demurrer, in holding that no cause of action ever came into existence in favor of the plaintiff.

[fols. 10 & 11] He therefore prays for such relief as is provided by law in the premises.

Edward F. Flynn, Executor of the Estate of Edward L. Flynn, by William A. Bree, William F. Geenty, His Attorneys.

I certify that the foregoing appeal was filed on the third day of October, A. D. 1929, and William F. Geenty is recognized in the sum of $100, conditioned that the said Edward F. Flynn, executor of the estate of Edward L. Flynn, shall prosecute said appeal to effect and pay all costs therein if he should fail to do so; and said appeal is hereby allowed.

G. Herbert Bishop, Assistant Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] IN SUPREME COURT OF ERRORS OF CONNECTICUT

EDWARD F. FLYNN, Executor,

v.

NEW YORK, N. H. & H. R. Co.

Third Judicial District, Bridgeport, October Term, 1929

Wheeler, C. J.; Maltbie, Haines, Hinman, and Banks, Js.

Action to recover damages for injury alleged to have been caused by the negligence of the defendant, brought to the Superior Court in New Haven County and tried to the court, Ells, J., upon a demurrer to the complaint which the court sustained; plaintiff having neglected and refused to plead further judgment was rendered for the defendant and plaintiff appealed. No error.

William A. Bree and William F. Geenty for the appellant (plaintiff).

E. R. Brumley, with whom on the brief was Fleming James, Jr., for the appellee (defendant).

OPINION

[fol. 13] WHEELER, C. J.:

The complainant alleges that the defendant was on December 4, 1923, a common carrier engaged in the business of transportation between states of the United States, that on this day its employee, Edward L. Flynn was injured through defendant's negligence, to which he did not contribute, and in consequence died on September 1, 1928, leaving surviving him his widow and five daughters and that the plaintiff is the duly qualified executor under the will of the decedent.

The defendant demurred to the complaint which was dated May 15, 1929, upon the principal ground, stated in several forms, that the injury to the decedent having occurred on December 4, 1923, and death having occurred on September 1, 1928, the plaintiff's action which was brought to recover for pecuniary loss to the widow and children of the decedent under the Federal Employers' Liability Act

of April 22, 1908, Chapter 149, Section 6 as amended by the Act of April 5, 1910, Chapter 143, is barred, since by it no cause of action ever accrued to the plaintiff. The reasons of appeal pursued by the appellant involve the single question raised by the demurrer which we have stated.

The Act of 1908 which we set out in the footnote,* creates [fol. 14] "two distinct and independent" causes of action against the carrier, one to the injured employee for the wrongful injury to him, the other in behalf of designated relatives for the pecuniary loss resulting to them by reason of the wrongful death. The latter action includes no damages which the decedent might have recovered had he survived but only the pecuniary damages to the relatives caused by his death which "can be measured by some standard."

Each action rests upon "the common foundation of a wrongful injury" but each is governed by "altogether different principles." These have been so definitely determined by the Supreme Court of the United States that a reference to some of these decisions is all that is now required. Mich. Cent. R. R. v. Vreeland, 227 59, 68, 70; 33 Sup. Ct. Rep. 192; Mellon v. Goodyear, 277 U. S. 335. We had a similar action under this Act before us in Farley v. New York, N. H. & H. R. Co., 87 Conn. 328, 335, 87 Atl.

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* "Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe', to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe'; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or

990. It was decided in July, 1913 while Mr. Justice Lurton's opinion in Mich. Cent. R. R. Co. v. Vreeland, supra, upon which we relied, was handed down in December, 1912.

Our opinion construes this act as applied to the second of these causes of action in this manner; "The statute under which the action was brought, in so far as it provides for recovery for death, follows the lines of Camp- [fol. 15] bell's Act in England, and in its distinguishing features is identical with that Act, Mich. Cent. R. Co. v. Vreeland, supra. It creates a right of action where there was none at common Law, and one which is entirely independent of any which the deceased may have had in life and which comes originally to the personal representative by the operation of the statute, and not by the process of survival. It is one for the exclusive benefit of certain specified persons, and the damages recoverable are such as result to them by reason of their having been deprived through the wrongful death of the deceased of a reasonable expectation of pecuniary benefits attendant upon his continuance in life." The action in behalf of the beneficiaries cannot be maintained unless the decedent immediately before his death could have maintained his action for injuries suffered by the negligence of the defendant, since the foundation of this action is the existence of this

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insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

injury. The authorities generally, as well as in this jurisdiction, so hold. Mich. Cent. R. R. Co. v. Vreeland, supra, at page 70; Mellon v. Goodyear, 277 U. S. 335, 341, and cases cited in each opinion; Kling v. Torrello, 87 Conn. 301.

It follows from this that a settlement of the claim of the injured person for his wrongful injury in the absence of fraud or mistake will bar an action in behalf of his relatives under this statute for his death. The Supreme Court reiterated its previously expressed view upon this point in these words: "By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud [fol. 16] or mistake, precludes any remedy by the personal representative based upon the same wrongful act. * * * The cases supporting this view, from courts of last resort in twenty-one States, Canada and England are collected in a note following the first opinion of the Supreme Court of Kansas in the present cause, reported in 39a L. R. 579." Mellon v. Goodyear, 277 U. S. 335, at page 344. The same rule, under this act, is applicable in case the decedent in his lifetime has recovered judgment for his injury and received satisfaction thereof. Seaboard Air Line Ry. Co. v. Oliver, 261 Fed. R. 1.

"Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured." Mich. Cent. R. Co. v. Vreeland, 227 U. S. at page 67. It was also held in this case that the Act of 1908 did not provide for a survival of a right of action but that this was extinguished by death. The Act was amended April 5, 1910, 36 Stat. 291 C. 143 by adding to it section 9. "That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

No change was made by the amendment in section 1 of the 1908 Act which we quote in the footnote. The amendment was construed in St. Louis v. Iron Mountain Ry. Co. v. Craft, 237 U. S. 648, 657, 658. It is there said: "It continues, as before, to provide for two distinct rights of action; * * * Without abrogating or entailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his [fol. 17] personal representative 'for the benefit of' the same relatives in whose behalf the other right is given."

Section 1 of Chap. 143 of the amending Act of 1910, 36 Stat. 291, in part provides: "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." Each of the actions authorized by this chapter was thereafter barred unless brought within two years from "the day the cause of action accrued." The plaintiff unless barred by this statute could have brought in behalf of the designated relatives his action for the injury to the decedent, and that the pecuniary loss suffered by his death, for the decedent would have had his right of action for his own injuries immediately prior to his death. In Rodgers v. Pennsylvania R. Co. 19 Fed. (2nd series) 522, the decedent was injured November 10, 1922, while in defendant's employ. On February 4, 1925, more than two years after the accident the decedent died without any action having been instituted upon his behalf. On December 2, 1926, an action was brought by the administratrix of the deceased under this Act to recover for the injuries to the decedent and for the pecuniary loss to the relatives by reason of the death of the decedent. It was held that the right of action of the representative was barred where the decedent lived more than two years after his injury and brought no action for his own injury in his lifetime.

The Act of 1910 in terms covers both of the actions authorized under section 1 of the Act of 1908, and since the decedent did not bring his action for his own injury within two years from the occurrence of the accident the right of his representative to bring his action is barred. This conclusion, we recognize, conflicts with a statement found in the opinion in Seaboard Air Line Ry. Co. v. Oliver, (C. C. [fol. 18] A.) 261 Fed. 1 at page 2.

The new right of action given the representative of the designated relatives to recover for the pecuniary loss to them through the death of the decedent is, as we have stated, "dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." Mich. Cent. R. Co. v. Vreeland, 227 U. S. at page 70. This is the rule under Lord Campbell's Act; the Federal Employers' Act is essentially identical with that. The cause of action for death arises upon the occurrence of the death but if the decedent's right of action for his wrongful injury has ceased to exist it would be as defendant insists anomalous to hold that the right of action for the wrong to the beneficiaries arising out of the wrongful injury to the decedent is enforceable. We discover no distinction between a judgment, or a settlement obtained by the decedent, and the lapse of the statutory period, in barring the maintenance of an action under this Act.

There is no error.

In this opinion the other judges concurred.

(The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports. Richard H. Phillips, Reporter.)

[fol. 19] In Supreme Court of Errors of Connecticut

Edward F. Flynn, of New Haven, Executor of the Estate of Edward L. Flynn,

vs.

The New York, New Haven & Hartford Railroad Company, a Connecticut Corporation Located in New Haven

On Appeal from the Superior Court New Haven County

Judgment—Mar. 31, 1930

This appeal by the plaintiff claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may

appear in the certified transcript of record and finding of facts, on file in this Court, was allowed by the Superior Court for New Haven County on the third day of October, A. D. 1929, and came to this Court, at its term held at Bridgeport on the fourth Tuesday in October, A. D. 1929, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the appellee recover of the appellant its costs taxed at $—.

Date of Judgment, March 31, 1930.

By the Court.

Alfred N. Wheeler, Clerk.

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Supreme Court of Errors of the State of Connecticut is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.